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WASHINGTON'S DOCTRINE OF CORPORATE DISREGARD

Thomas V. Harris*

I. INTRODUCTION

Corporations are ordinarily recognized as legal entities separate and distinct both from their own shareholders, officers, and directors, and from other corporations.¹ There are, however, situations in which the Washington courts will not recognize this separateness. In such cases, the shareholders, officers, directors, or even wholly separate corporations, are held responsible for the corporation's activities. When they have refused to recognize the corporation as a separate legal entity, Washington's courts have employed the "doctrine of disregard."²

The consequences of the doctrine are not borne by the corporation. Frequently, its underlying liability has already been established. In other cases, the corporation's own responsibility is not an issue. In all cases, the doctrine's remedial power is directed against the shareholders, officers, directors, or other corporations that are "alter egos" of the corporation.³

The doctrine of disregard has been most often considered with respect to close corporations, parent-subsidary corporations, and brother-sister

* Shareholder, Merrick, Hofstedt & Lindsey, P.S., Seattle, Washington; A.B., 1970, Harvard College; J.D., 1973, Cornell University.

1. Grayson v. Nordic Constr. Co., 92 Wn. 2d 548, 552-53, 599 P.2d 1271, 1273 (1979).

2. Culinary Workers Local 596 v. Gateway Cafe, Inc., 91 Wn. 2d 353, 366-67, 588 P.2d 1334, 1343 (1979). The courts have also referred to the doctrine as "piercing the corporate veil." Frigidaire Sales Corp. v. Union Properties, Inc., 88 Wn. 2d 400, 404, 562 P.2d 244, 247 (1977). Both concepts are used interchangeably to accomplish the same result. See, e.g., Grayson v. Nordic Constr. Co., 92 Wn. 2d 548, 553, 599 P.2d 1271, 1273 (1979); Frigidaire Sales Corp. v. Union Properties, Inc. 88 Wn. 2d at 404-05, 562 P.2d at 247; J.I. Case Credit Corp. v. Stark, 64 Wn. 2d 470, 475, 392 P.2d 215, 218-19 (1964); State v. Davies, 176 Wash. 100, 113-14, 28 P.2d 322, 327 (1934). In Morgan v. Burks, 22 Wn. App. 768, 770 n.1, 592 P.2d 658, 659 n.1 (1979), *rev'd on other grounds*, 93 Wn. 2d 580, 611 P.2d 751 (1980), the court of appeals indicated that the generic term "disregarding the corporate entity" is more appropriate. Washington Supreme Court Justice Charles Horowitz adopted the "disregard" terminology in his article *Disregarding the Entity of Private Corporations*, 14 WASH. L. REV. 285 (1939), 15 WASH. L. REV. 1 (1940).

The corporation and other entities whose separate existences are not recognized are often called "alter egos." E.g., Grayson v. Nordic Constr. Co., 92 Wn. 2d at 553, 599 P.2d at 1273; Garvin v. Matthews, 193 Wash. 152, 156, 74 P.2d 990, 992 (1938).

3. The doctrine of disregard should not be confused with concepts relating to successor corporations or with the principle that corporate shareholders, officers, and directors are individually liable for their own wrongful acts. Successor corporations may be held liable for the obligations owed by predecessor corporations. Culinary Workers Local 596 v. Gateway Cafe, Inc., 91 Wn. 2d 353, 366, 588 P.2d 1334, 1343 (1979). Officers, directors, and other agents of a corporation, moreover, are

corporations. A close corporation is a corporation whose stock is held by a small number of shareholders. One-man, family, and professional corporations are all close corporations. In a parent-subsidiary relationship, the parent corporation is the controlling shareholder of the subsidiary corporation's stock. Brother-sister⁴ corporations are two corporations both of which are controlled by the same nucleus of shareholders. Brother-sister corporations do not own controlling shares of each other's stock.

The applicability of the doctrine of disregard is not limited to those three relationships. The doctrine can be applied in any situation where the corporate form has been abused. In an appropriate case, Washington's courts will refuse to recognize even the largest publicly-held corporation as being separate from its shareholders, officers, directors, or other entities that have abused it.

Under any circumstances, the resolution of issues involving the doctrine is a complex process. The inner workings and ramifications of the doctrine can be fully appreciated only after one analyzes the circumstances in which the doctrine will be applied, its jurisprudential history, the equitable nature of the doctrine, doctrinal distinctions among different types of corporations, and the manner in which issues involving the doctrine are litigated and reviewed.

II. THE FUNCTIONS OF THE DOCTRINE

The doctrine of disregard can be invoked in many different factual contexts. Most of those situations involve one or more of the following five functional concerns: providing a remedy, creating a new substantive liability, creating a right or benefit in favor of shareholders, promoting convenience, and constituting or allowing assertion of a defense.

A. *Providing a Remedy*

It is where there is an underlying claim against the corporation that the

personally liable for their own wrongful acts. *Grayson v. Nordic Constr. Co.*, 92 Wn. 2d 548, 553, 599 P.2d 1271, 1274 (1979). Invocation of either of these legal principles may lead to the same result. Conceptually, however, they should be distinguished from the doctrine of disregard.

4. The "brother-sister" terminology appears in H. HENN, *CASES AND MATERIALS ON THE LAW OF CORPORATIONS* 248 (1974). Washington's courts have never adopted Henn's anthropomorphic language, or any other terminology, to describe this relationship. It might be more appropriate to classify such entities as "affiliated" corporations. Unfortunately, the terminology "affiliated" has been used to refer indistinguishably to both "parent-subsidiary" and "brother-sister" corporations. See R. STEVENS & H. HENN, *STATUTES, CASES, AND MATERIALS ON THE LAW OF CORPORATIONS* 375 (1965). In the one Washington case using the terminology "affiliated," that term referred to a parent-subsidiary relationship. *Washington Sav-Mor Oil Co. v. State Tax Comm'n*, 58 Wn. 2d 518, 523, 364 P.2d 440, 443 (1961).

doctrine is most often considered. The doctrine has also been invoked in criminal actions so as to allow wider enforcement of a criminal law.⁵ In practice, the legitimacy of the underlying claim is often litigated in the same action.⁶

The doctrine allows fuller satisfaction of the underlying right when the corporation lacks sufficient assets to completely discharge its obligations.⁷ The separate existence of a corporation, however, will not be disregarded solely because its assets are not sufficient to meet its obligations.⁸ As the Washington courts have recognized, a corporation's shareholders can legitimately seek to limit their liability.⁹

B. Creating a New Substantive Liability

The doctrine of disregard may be invoked even though there is no underlying claim or issue involving the corporation. In such cases, application of the doctrine creates a new liability against each shareholder or other entity whose separate existence is not recognized. It is in contract cases where the doctrine is commonly invoked in this fashion. Characterizing the corporation and other entities as "alter egos" can substantially affect the breadth of contractual duties.¹⁰

5. *State v. Davies*, 176 Wash. 100, 28 P.2d 322 (1934).

6. *E.g.*, *Sommer v. Yakima Motor Coach Co.*, 174 Wash. 638, 26 P.2d 92 (1933); *Peterick v. State*, 22 Wn. App. 163, 589 P.2d 250 (1977).

7. The following are cases in which the doctrine of disregard has been evaluated in a remedial sense: *Morgan v. Burks*, 93 Wn. 2d 580, 611 P.2d 751 (1980); *Grayson v. Nordic Constr. Co.*, 92 Wn. 2d 548, 599 P.2d 1271 (1979); *Culinary Workers Local 596 v. Gateway Cafe, Inc.*, 91 Wn. 2d 353, 588 P.2d 1334 (1979); *Frigidaire Sales Corp. v. Union Properties, Inc.*, 88 Wn. 2d 400, 562 P.2d 244 (1977); *Critzer v. Oban*, 52 Wn. 2d 446, 326 P.2d 53 (1958); *Deno v. Standard Furniture Co.*, 190 Wash. 1, 66 P.2d 1158 (1937); *Sommer v. Yakima Motor Coach Co.*, 174 Wash. 638, 26 P.2d 92 (1933); *Platt v. Bradner Co.*, 131 Wash. 573, 230 P. 633 (1924); *Peterick v. State*, 22 Wn. App. 163, 589 P.2d 250 (1977).

8. *Morgan v. Burks*, 93 Wn. 2d 580, 582, 611 P.2d 751, 754 (1980); *Frigidaire Sales Corp. v. Union Properties, Inc.*, 88 Wn. 2d 400, 406, 562 P.2d 244, 247 (1977).

9. *Culinary Workers Local 596 v. Gateway Cafe, Inc.*, 91 Wn. 2d 353, 366, 588 P.2d 1334, 1343 (1979); *Burns v. Norwesco Marine, Inc.*, 13 Wn. App. 414, 418, 535 P.2d 860, 862-63 (1975).

10. *See Superior Portland Cement, Inc. v. Pacific Coast Cement Co.*, 33 Wn. 2d 169, 205 P.2d 597 (1949); *State ex rel. Tacoma v. Tacoma Ry. & Power Co.*, 61 Wash. 507, 112 P. 506 (1911). In *Tacoma Ry. & Power*, Puget Sound Electric Railway owned two separate rail transportation companies (hereinafter referred to as the "railway company" and the "transfer company"). The railway company entered into a contract with the City of Tacoma. By asserting the doctrine of disregard, the city sought to bind the transfer company, as well as the railway company, to the terms of the contract. The trial court invoked the doctrine and awarded a writ of mandamus compelling the transfer company to perform the obligations set out in the city-railway company contract. The supreme court reversed the granting of the writ, but only because the activities of the railway company and the transfer company did not justify the trial court's application of the doctrine. If the circumstances had justified application of the doctrine, the scope of the contract would have been substantially expanded.

Plaintiffs have also sought to fashion new substantive liabilities by invoking the doctrine in replevin and insurance rehabilitation proceedings.¹¹ Application of the doctrine may even create new substantive *rights* for third parties without necessarily creating a liability against either the corporation or its shareholders.¹²

C. *Creating a Right or Benefit in Favor of Shareholders*

In *Garvin v. Matthews*,¹³ the Washington Supreme Court formulated the general rule that only third persons can invoke the doctrine of disregard.¹⁴ That rule has been followed in two tax cases in which corporations themselves requested the court to apply the doctrine. In one case¹⁵ the defendant parent corporation sold management services to its subsidiary. The other case¹⁶ involved the selling of goods by the defendant subsidiary corporation to its parent. In both cases, the defendant corporation contended that the separate existence of the purchasing corporation should be disregarded so that the transaction would not be characterized as a "sale" subject to business and occupation taxes. The court refused to invoke the doctrine for the benefit of the corporations that had, for their own business reasons, treated themselves as formally separate entities.¹⁷

Despite the limitation set out in *Garvin v. Matthews*, the Washington courts have, on at least one occasion, allowed a shareholder to benefit from the application of the doctrine.¹⁸ In resolving the probate proceeding

11. *Kueckelhan v. Federal Old Line Ins. Co.*, 69 Wn. 2d 392, 418 P.2d 443 (1966) (insurance rehabilitation); *Sweet v. Lease*, 154 Wash. 25, 280 P. 742 (1929) (replevin).

12. See *Seattle Ass'n of Credit Men v. Daniels*, 15 Wn. 2d 393, 130 P.2d 892 (1942). In this case, Eba's Inc. ("Eba") executed an assignment for the benefit of creditors to Seattle Association of Credit Men ("SACM"). SACM sought to recover, as a preference, a payment made by Eba to defendants Daniels and Turnquist for their repair of a store front. The trial court applied the rule that a payment made by an insolvent (Eba) to discharge a lien against its property did not constitute a preference and dismissed SACM's action.

The supreme court reversed after determining that Daniels and Turnquist did not have an enforceable lien against Eba. Technically, Eba was not the lessee in possession of the property. The defendants alleged that the actual lessee—Dutch Maid Foods—and Eba were one and the same corporation, that their separate identity should be disregarded, that the lien was enforceable, and that, as a result, the payment was not a preference.

The supreme court held that the facts in the case did not justify application of the doctrine. Had the Eba-Dutch Maid Foods relationship called for the application of the doctrine, the court would have recognized Daniels and Turnquist's entitlement without affixing a corresponding liability against Eba, the disregarded corporation. See also notes 23–25 and accompanying text *infra*.

13. 193 Wash. 152, 74 P.2d 990 (1938).

14. *Id.* at 157, 74 P.2d at 992.

15. *Rena-Ware Distrib., Inc. v. State*, 77 Wn. 2d 514, 463 P.2d 622 (1970).

16. *Washington Sav-Mor Oil Co. v. State Tax Comm'n*, 58 Wn. 2d 518, 364 P.2d 440 (1961).

17. *Rena-Ware Distrib., Inc. v. State*, 77 Wn. 2d 514, 518, 463 P.2d 622, 625 (1970); *Washington Sav-Mor Oil Co. v. State Tax Comm'n*, 58 Wn. 2d 518, 523, 364 P.2d 440, 443 (1961).

18. *In re Estate of Trierweiler*, 5 Wn. App. 17, 486 P.2d 314 (1971).

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in *In re Estate of Trierweiler*,¹⁹ the court invoked the doctrine to create an equitable lien in favor of a shareholder of the disregarded corporation. The doctrine was invoked even though creation of the equitable lien was at the expense of third parties.²⁰

D. Promoting Convenience

When third-party interests have not been involved, the Washington courts have invoked the doctrine both as a convenience and to avoid circuitous litigation.²¹ The courts will also routinely disregard the corporate entity when distributing property in a dissolution action.²²

E. Constituting or Allowing Assertion of a Defense

The doctrine can be applied to protect a party's right to assert an affirmative defense to a claim.²³ In *J.I. Case Credit Corp. v. Stark*,²⁴ the

19. *Id.* Roy Trierweiler died intestate. He was survived by his third wife and by the two children of his first marriage. All of the decedent's assets were his separate property. R.C.W. § 11.04.020 entitled Mrs. Trierweiler to only one-third of the separate real property and one-half of the separate personal property. WASH. REV. CODE § 11.04.020 (1974). Ordinarily, the balance of the decedent's property would be shared equally by the decedent's two children. *Id.*

The trial court, nevertheless, awarded the entirety of the decedent's property to Mrs. Trierweiler. Its ruling was based upon an "equitable lien" arising out of both (1) investments made by Mrs. Trierweiler that preserved her husband's separate estate, and (2) the use of her separate funds to support the marital community. Much of Mrs. Trierweiler's assets were, in fact, contributed to the Trierweilers' yarn business. The children alleged that an unprofitable corporation formed by the decedent owned the yarn business and that the wife's contributions were made to the corporation and not to the decedent.

The court of appeals affirmed the trial court's determination that the corporation should be disregarded. The court held that the deceased "treated the business as his own." 5 Wn. App. at 21, 486 P.2d at 317. Mrs. Trierweiler's contributions to the corporation were treated as assets contributed to her husband. She was permitted to assert the doctrine even though she was a major shareholder in the corporation, was active in the yarn business, and the children were not chargeable with any wrongdoing. The court employed the doctrine in order to protect the wife's legitimate interests. She had been the sole manager of the yarn business during most of her marriage to the decedent. Unlike the decedent's children, Mrs. Trierweiler financially supported and cared for the decedent during a long and severe illness.

20. 5 Wn. App. at 21, 486 P.2d at 317.

21. In *Harrison v. Puga*, 4 Wn. App. 52, 63-64, 480 P.2d 247, 254 (1971), the court disregarded the corporate entity so as to avoid a subsequent receivership proceeding. *See also* *Morgan v. Burks*, 93 Wn. 2d 580, 589, 611 P.2d 751, 756 (1980); note 69 *infra*.

22. *Platts, Inc. v. Platts*, 49 Wn. 2d 203, 298 P.2d 1107 (1956); *Clark v. Schwaegler*, 104 Wash. 12, 175 P. 300 (1913).

23. *J.I. Case Credit Corp. v. Stark*, 64 Wn. 2d 470, 392 P.2d 215 (1964); *H.E. Briggs & Co. v. Harper Clay Prods. Co.*, 150 Wash. 235, 272 P. 962 (1928); *Keane v. Watson Co.*, 149 Wash. 424, 271 P. 73 (1928); *Seattle International Corp. v. Commerce & Indus. Ins. Co.*, 24 Wn. App. 108, 600 P.2d 612 (1979).

24. 64 Wn. 2d 470, 392 P.2d 215 (1964).

plaintiff credit corporation sought to foreclose a chattel mortgage originally held by its wholly-owned manufacturing company. The court allowed the defendant to assert the same defenses against the credit company that it could have raised against the manufacturing company. The court disregarded the separate corporate existence of the credit company and held that it would not be allowed the rights of a holder in due course.²⁵

III. THE DECISION TO DISREGARD

A. General Criteria

The Washington Supreme Court has indicated that both of the following elements must be proved before the corporate entity will be disregarded:

1. That there is such a commingling²⁶ of property rights or interests as to render it apparent that the corporation and some other entity were intended to function as one;
2. That to regard the corporation and the other entity as separate would aid the consummation of a fraud or wrong upon others.²⁷

Prior to the recent decision in *Morgan v. Burks*,²⁸ there was substantial confusion as to whether it was necessary to prove one or both of the requisite elements before the doctrine would be applied. Earlier, in *Pittsburgh Reflector Co. v. Dwyer & Rhodes Co.*,²⁹ the court recognized that it had not resolved this issue.³⁰ Moreover, in two recent pre-*Morgan* decisions, the court had used language consistent with a disjunctive test.³¹

25. *Id.* at 478, 392 P.2d at 220.

26. In determining whether to disregard the corporate entity, the trial court can consider corporate behavior occurring both before and/or after the underlying claim has matured. *Morgan v. Burks*, 93 Wn. 2d 580, 585, 611 P.2d 751, 754-55 (1980).

27. *Id.* at 587-88, 611 P.2d at 756-57; *J.I. Case Credit Corp. v. Stark*, 64 Wn. 2d 470, 475, 392 P.2d 215, 218 (1964). *See also* *Sommer v. Yakima Motor Coach Co.*, 174 Wash. 638, 654, 26 P.2d 92, 98 (1933).

28. 93 Wn. 2d 580, 611 P.2d 751 (1980).

29. 173 Wash. 552, 23 P.2d 1114 (1933).

30. *Id.* at 555, 23 P.2d at 1115.

31. *Grayson v. Nordic Constr. Co.*, 92 Wn. 2d 548, 552-53, 599 P.2d 1271, 1273 (1979); *Frigidaire Sales Corp. v. Union Properties, Inc.*, 88 Wn. 2d 400, 405, 562 P.2d 244, 247 (1977).

Since 1940, Justice Charles Horowitz has been Washington's leading scholar on the doctrine of disregard. In *Soderberg Advertising, Inc. v. Kent-Moore Corp.*, 11 Wn. App. 721, 734, 524 P.2d 1355, 1363-64 (1974), Justice Horowitz, then a court of appeals judge, recognized that this confusion had not been resolved in the 41 years that had passed since *Pittsburgh Reflector Co. v. Dwyer & Rhodes Co.*, 173 Wash. 552, 23 P.2d 1114 (1933). Although the court of appeals did not expressly address the issue, its decisions in *Morgan v. Burks*, 22 Wn. App. 768, 592 P.2d 658 (1979), *rev'd*, 93 Wn. 2d 580, 611 P.2d 751 (1980) and *Peterick v. State*, 22 Wn. App. 163, 589 P.2d 250 (1977), implicitly adopted the approach that only one of the two elements need be proved. Justice Horowitz'

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The historical development of the doctrine in Washington supports the conclusion that *both* elements must be proved.³² Requiring both elements to be proved is not a novel approach. The courts in California, Oregon, and Idaho apply the same conjunctive test adopted by the Washington courts.³³

B. A Case-by-Case Approach

The two general criteria offer only the most general guidance to the trial court. In reality, every case is decided upon its own peculiar facts. The Washington Supreme Court has emphasized the limited value of doctrinal concepts in this area.³⁴ In *Culinary Workers Local 596 v. Gateway Cafe, Inc.*,³⁵ the court tersely noted that: "Appellants' case involves a *factual situation* where it was *appropriate* to disregard the corporate entity. . . ." ³⁶

court of appeals decision in *Soderberg Advertising*, 11 Wn. App. at 734, 524 P.2d at 1363-64 implied that he also felt that the test should be a *disjunctive* one. In fact, Justice Horowitz earlier indicated his preference for such a disjunctive test in his article *Disregarding the Entity of Private Corporations*, 15 WASH. L. REV. 1, 17 (1940).

Justice Horowitz wrote the supreme court's majority opinion in *Morgan v. Burks*, 93 Wn. 2d 580, 611 P.2d 751 (1980). In that opinion, he recognized the *conjunctive* nature of the trial court's deliberations. *Id.* at 587-88, 611 P.2d at 756-57.

32. In *Morrison v. Blue Star Navig. Co.*, 26 Wash. 541, 67 P. 244 (1901), perhaps the earliest case in which a corporation's separate existence was disregarded, the court did not even utilize "piercing the corporate veil" or "disregard" terminology. In a subsequent case, *Platt v. Bradner Co.*, 131 Wash. 573, 230 P. 633 (1924), the court showed its nascent interest in doctrinal development. The following language in that case provided the basis for what has become the first element in the current two-step test: "[W]hen one corporation so dominates and controls another as to make that other a simple instrumentality or adjunct to it, the courts will look beyond the legal fiction of distinct corporate existence, as the interests of justice require. . . ." *Id.* at 579, 230 P. at 635 (emphasis added).

In *First Nat'l Bank v. Walton*, 146 Wash. 367, 374, 262 P. 984, 986 (1928), the court held that there were *two* elements and that both must be proved if the doctrine were to be applied. This decision appears to be the first case setting out both elements now recognized by the supreme court. Actually, the first element established in *Platt v. Bradner Co.* and the second element recognized in *First Nat'l Bank v. Walton* are not wholly distinct. Where *Platt v. Bradner Co.* expressed the caveat "as justice requires," the decision in *First Nat'l Bank v. Walton* dropped the caveat and simply indicated that the corporate entity would be disregarded only where to do otherwise "would work a fraud upon third persons." Both cases support the proposition that corporate misconduct will support a disregard of the corporate entity only when it causes harm. The two decisions could be viewed as being inconsistent only if "as justice requires" should be construed as a "punitive" rather than as a "compensatory" concept. Such a construction is not consistent with the compensatory nature of Washington law. *See, e.g., Stanard v. Bolin*, 88 Wn. 2d 614, 565 P.2d 94 (1977); *Steele v. Johnson*, 76 Wn. 2d 750, 458 P.2d 889 (1969).

33. *Minich v. Gem State Developers, Inc.*, 99 Idaho 911, 591 P.2d 1078 (1979); *Schlecht v. Equitable Builders, Inc.*, 222 Or. 92, 535 P.2d 86 (1975); *Automotriz Del Golfo De California v. Resnick*, 47 Cal. 2d 792, 306 P.2d 1 (1957).

34. *First Nat'l Bank v. Walton*, 146 Wash. 367, 375-76, 262 P. 984, 987 (1928).

35. 91 Wn. 2d 353, 588 P.2d 1334 (1979).

36. *Id.* at 367, 588 P.2d at 1343 (emphasis added). *See also Zander v. Larsen*, 41 Wn. 2d 503,

The two general elements are markedly different. The first element requires the court to determine whether the shareholders³⁷ abused the corporate form. The various Washington cases contain many different alleged instances of such corporate misconduct or wrongdoing.³⁸

The second element involves both causal and policy-oriented concerns.

511, 250 P.2d 531, 535 (1952); *McCurdy v. Spokane Western Power & Traction Co.*, 174 Wash. 470, 497, 24 P.2d 1075, 1083-84 (1933).

37. Cases in which the doctrine of disregard can be asserted may also involve the conduct and alleged personal liability of officers, directors, and other companies or entities that are not shareholders in the abused corporation. See notes 1-3 and accompanying text *supra*.

38. The Washington Supreme Court has never compiled a list of forbidden corporate activities. Although such a compendium would be *obiter dictum*, it would provide a useful guide for those concerned with preserving a corporation's integrity.

In *Disregarding the Entity of Private Corporations*, 14 WASH. L. REV., 285, 292-93 (1939), Justice Horowitz listed some of the corporate activities subsumed within the first element's general language:

In parent and subsidiary corporation cases, a most important field for invoking the doctrine, there must be more than mere stockholder control of the entity sought to be disregarded. There must be what may be best noted as *manipulation*. Thus, in addition to the usual elements of common stockholders, directors and officers, the following facts have been relied on: Excessive financing by the parent of the subsidiary corporation; payment of the subsidiary's expenses and losses by the parent; use by the parent of the subsidiary's property as his or its own; description by the parent of the subsidiary as part of its business; the acts of the subsidiary in the interest of the parent, rather than its own interest; the fact that the subsidiary has no business except for the parent corporation, and no assets except those conveyed to it by the parent corporation; the fact that formal legal requirements such as meetings, elections and separate bookkeeping devices are not observed by the subsidiary.

(footnotes omitted) (emphasis in original).

In *Arnold v. Browne*, 27 Cal. App. 3d 385, 386, 394-95, 103 Cal. Rptr. 775, 781-82 (1972), the California Court of Appeals set out a list of factors that could be considered in evaluating the first element:

Among the possible factors pertinent to the trial court's determination are: Commingling of funds and other assets, failure to segregate funds of the separate entities, and the unauthorized diversion of corporate funds or assets to other than corporate uses; the treatment by an individual of the assets of the corporation as his own; the failure to obtain authority to issue or subscribe to stock; the holding out by an individual that he is personally liable for the debts of the corporation; the failure to maintain minutes or adequate corporate records and the confusion of the records of the separate entities; the identical equitable ownership in the two entities; the identification of the equitable owners thereof with the domination and control of the two entities; identification of the directors and officers of the two entities in the responsible supervision and management; the failure to adequately capitalize a corporation; the absence of corporate assets, and undercapitalization; the use of a corporation as a mere shell, instrumentality or conduit for a single venture or the business of an individual or another corporation; the concealment and misrepresentation of the identity of the responsible ownership, management and financial interest or concealment of personal business activities; the disregard of legal formalities and the failure to maintain arm's length relationships among related entities; the use of the corporate entity to procure labor, services or merchandise for another person or entity; the diversion of assets from a corporation by or to a stockholder or other person or entity, to the detriment of creditors, or the manipulation of assets and liabilities between entities so as to concentrate the assets in one and the liabilities in another; the contracting with another with intent to avoid performance by use of a corporation as a subterfuge of illegal transactions; and the formation and use of a corporation to transfer to it the existing liability of another person or entity. . . .

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In considering this second requirement, the court must determine, in each particular case, if any of the wrongful corporate activities actually harmed the party seeking relief.³⁹ Corporate misconduct will not itself justify a disregard of the corporate entity.⁴⁰

IV. DISTINCTIONS BASED ON THE NATURE OF THE SHAREHOLDER

The same general criteria apply to all corporations. Special considerations, however, apply to all three types of corporation-shareholder relationships to which the doctrine is most often applied.

A. *Close Corporations*

Close corporations are legal entities whose shares of stock are held by a small nucleus of shareholders. The supreme court has rejected arguments that the two general criteria should be applied more stringently to close corporations.⁴¹

The decision to disregard the corporate entity in the case of a close corporation does not end the court's inquiry. Application of the doctrine of disregard is not necessary with respect to shareholders whose individual wrongdoing created the underlying claim.⁴² As for the other shareholders, however, the court must decide which, if any, of them are to be held individually liable for the corporation's responsibilities. Washington's courts have implicitly recognized that shareholders not associated with corporate misconduct should not be held individually liable either for the underlying claim against the corporation or for the abusive activity of the wrongdoing shareholders.⁴³

Failure to comply with the provisions set out in the Washington Business Corporation Act, WASH. REV. CODE §§ 23A.04-.98 (1979), might, in an appropriate case, support a determination that a corporation has been abused.

39. *Morgan v. Burks*, 93 Wn. 2d 580, 587-88, 611 P.2d 751, 756-57 (1980); *Truckweld Equip. Co. v. Olson*, 26 Wn. App. 638, 644, ____ P.2d ____, ____ (1980).

40. See cases cited in note 39 *supra* and see note 83 *infra*.

41. *Grayson v. Nordic Constr. Co.*, 92 Wn. 2d 548, 553, 599 P.2d 1271, 1274 (1979). Cf. *Nursing Home Bldg. Corp. v. DeHart*, 13 Wn. App. 489, 495, 535 P.2d 137, 142 (1975) (the court noted at least a statistical trend to disregard the corporate entity more readily in cases involving close corporations than in those involving publicly-held companies). The use of the corporate form does not allow persons rendering "professional services" to avoid their individual liabilities to their clients. WASH. REV. CODE § 18.100.070 (1979).

42. *Grayson v. Nordic Constr. Co.*, 92 Wn. 2d 548, 554, 599 P.2d 1271, 1274 (1979).

43. See *id.* at 553, 599 P.2d at 1273-74; *Garvin v. Matthews*, 193 Wash. 152, 156-57, 74 P.2d 990, 992 (1938); *Briggs & Co. v. Harbor Clay Prods. Co.*, 150 Wash. 235, 238-39, 272 P. 962, 963 (1928); *Burns v. Norwesco Marine, Inc.*, 13 Wn. App. 414, 419-20, 535 P.2d 860, 863-64 (1975).

This freedom of innocent shareholders from liability is recognized both in cases (1) where the

B. Parent-Subsidiary Corporations

Unlike the situation involving close corporations, there is, of necessity, only one shareholder where a parent corporation wholly owns the stock of its subsidiary. Because the doctrine's focal point is the corporation and its wrongdoing shareholders, the fact that many or few shareholders own the parent will not be considered.⁴⁴ Even if they are personally blameless, shareholders of the parent corporation will be indirectly sanctioned when the parent's misuse of a subsidiary has prejudiced an innocent third party. The effect of the decision to disregard the parent's separate identity will vary depending on the number of its shareholders.

C. Brother-Sister Corporations

Brother-sister corporations are companies whose shares are owned by a common nucleus of shareholders. Neither corporation owns a controlling share of the other corporation's stock. That fact does not necessarily insulate the two corporations from the doctrine of disregard. If a nonshareholding corporation commingles its assets with another corporation's assets to the detriment of a third party, the Washington courts will treat the corporations as "alter egos."⁴⁵

The lack of a corporation-shareholder relationship does, however, reduce the likelihood that either corporation will be held responsible for the other's activities. As the court recognized in *McCurdy v. Spokane Western Power & Traction Co.*:⁴⁶

Neither the traction company nor the valley company dominated or controlled the other. While Mr. Stoolfire may have dominated both, his domination was exerted upon each as a separate concern. They were at all times kept separate and distinct, and neither encroached upon the other in its operation. . . .⁴⁷

underlying tortious or wrongful activity was intrinsically involved with the corporate misconduct justifying the decision to disregard and (2) where the underlying liability and the corporate misconduct are distinct from one another. An example of the former factual situation is set out in *Harrison v. Puga*, 4 Wn. App. 52, 480 P.2d 247 (1971), where the misappropriation of \$16,000 from the corporation was itself the basis for the underlying claim. *Sommer v. Yakima Motor Coach Co.*, 174 Wash. 638, 26 P.2d 92 (1933) involved the latter situation. In *Sommer*, the claim for the negligent starting of a fire by defendant's driver was wholly unrelated to the alleged corporate irregularities.

44. That the number of shareholders in the parent corporation is irrelevant has been recognized by negative implication but not by an express holding. See *J.I. Case Credit Corp. v. Stark*, 64 Wn. 2d 470, 392 P.2d 215 (1964); *Sommer v. Yakima Motor Coach Co.*, 174 Wash. 638, 26 P.2d 92 (1933).

45. *Pittsburgh Reflector Co. v. Dwyer & Rhodes Co., Inc.*, 173 Wash. 552, 554-55, 23 P.2d 1114, 1115 (1933). In that case, the facts did not justify application of the doctrine.

46. 174 Wash. 470, 24 P.2d 1075 (1933).

47. *Id.* at 496-97, 24 P.2d at 1083-84. See also *State ex rel. Tacoma v. Tacoma Ry. & Power Co.*, 61 Wash. 507, 112 P. 506 (1911).

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It seems far more likely that, in cases involving brother-sister corporations, the common nucleus of shareholders owning both corporations would be the target of the doctrine of disregard.

V. THE EQUITABLE NATURE OF THE DOCTRINE

A. *In General*

In *Bangor Punta Operations, Inc. v. Bangor & Aroostook Railroad*,⁴⁸ the United States Supreme Court expressly recognized the equitable nature of the doctrine of disregard:

In such cases, courts of *equity*, piercing all fictions and disguises, will deal with the substance of the action and not blindly adhere to the corporate form. Thus, where equity would preclude the shareholders from maintaining an action in their own right, the corporation would also be precluded. . . . It follows that Amoskeag, the principal beneficiary of any recovery and itself estopped from complaining of petitioners' alleged wrongs, cannot avoid the *command of equity* through the guise of proceeding in the name of respondent corporations which it owns and controls.⁴⁹

The Washington courts have alluded to the equitable origin of the doctrine.⁵⁰ They have not, however, clearly recognized that the equitable nature of the doctrine (1) dictates how issues involving the doctrine are litigated and (2) enlarges the scope of the trial court's remedial powers.

B. *The Jury Trial Issue*

Equitable matters are not triable by a jury as a matter of right.⁵¹ Even if a jury is empaneled in an equitable proceeding, it serves only as an advisor to the court.⁵² Consequently, a civil⁵³ jury cannot serve as the trier of

48. 417 U.S. 703 (1974).

49. *Id.* at 713 (emphasis added). See also *Arnold v. Browne*, 27 Cal. App. 3d 386, 103 Cal. Rptr. 775, 781 (1972).

50. *Morgan v. Burks*, 93 Wn. 2d 580, 588, 611 P.2d 751, 757 (1980); *Washington Sav-Mor Oil Co. v. State Tax Comm'n*, 58 Wn. 2d 518, 523, 364 P.2d 440, 443 (1961); *Superior Portland Cement, Inc. v. Pacific Coast Cement Co.*, 33 Wn. 2d 169, 216, 205 P.2d 597, 622 (1949); *Truckweld Equip. Co. v. Olson*, 26 Wn. App. 638, 643, ____ P.2d ____, ____ (1980); *In re Estate of Trierweiler*, 5 Wn. App. 17, 20, 486 P.2d 314, 317 (1971).

51. *Garey v. City of Pasco*, 89 Wash. 382, 383, 154 P. 433, 433 (1916). The Washington State Constitution provides that the right to jury trial shall remain inviolate. WASH. CONST. art. I, § 21. That guarantee, however, applies only to those causes of action that were triable to juries as a matter of right at the time the constitution was adopted. *Garey v. City of Pasco*, 89 Wash. at 383, 154 P. at 433. Equitable issues have never been triable by jury as a matter of right. *Id.*

52. *Leitch v. Young*, 60 Wash. 446, 448, 111 P. 449, 449-50 (1910). Determinations made by such an advisory jury have no binding effect upon the court. *Rathjens v. Merrill*, 38 Wash. 442, 453, 80 P. 754, 757 (1905). The court need not even empanel an advisory jury. *Coleman v. Highland Lumber, Inc.*, 46 Wn. 2d 549, 551, 283 P.2d 123, 124-25 (1955).

53. A criminal defendant's right to a jury trial is guaranteed by both the United States and the

factual issues involving the doctrine of disregard. The Washington courts have not consistently recognized this restriction.

The supreme court has specifically addressed the jury trial issue in only one case involving the doctrine of disregard.⁵⁴ In that case, *Sommer v. Yakima Motor Coach Co.*,⁵⁵ the court held that issues involving the doctrine must be resolved by the trial judge.⁵⁶ In *J.I. Case Credit Corp. v. Stark*,⁵⁷ the trial court empaneled an advisory jury, but granted judgment notwithstanding its findings.⁵⁸

Despite the court's ruling in *Sommer v. Yakima Motor Coach Co.*, juries were empaneled as the trier of fact and ultimately resolved issues involving the doctrine of disregard in several subsequent cases.⁵⁹ Juries also served as the trier of fact in at least two earlier cases.⁶⁰

The confusion remains unresolved. In *Morgan v. Burks*,⁶¹ the plaintiff unsuccessfully sought to have a jury serve as the ultimate trier of fact. Although the jury trial issue was squarely raised both at trial and on appeal, neither of the two appellate court opinions even noted that the issue had been argued.⁶²

C. Fashioning a Remedy

In cases in which the doctrine is applied, the court must determine the scope of the shareholders' liability. The equitable nature of the doctrine provides the trial court with substantial discretion in fashioning a remedy that is just under all the circumstances.⁶³

When the underlying claim involves money damages, the court must determine whether the wrongdoing shareholders are liable for the full amount, or for only a portion of the underlying claim. In making that

Washington State Constitutions. U.S. CONST. amend. VI; WASH. CONST. art. I, § 21. See *State v. Davies*, 176 Wash. 100, 28 P.2d 322 (1934).

54. *Sommer v. Yakima Motor Coach Co.*, 174 Wash. 638, 26 P.2d 92 (1933).

55. *Id.*

56. *Id.* at 649, 659, 26 P.2d at 96, 100.

57. 64 Wn. 2d 470, 392 P.2d 215 (1964).

58. *Id.* at 472-73, 392 P.2d at 217.

59. *Allman Hubble Tugboat Co. v. Reliance Dev. Corp.*, 193 Wash. 234, 235, 74 P.2d 985, 985 (1938); *Deno v. Standard Furniture Co.*, 190 Wash. 1, 10, 66 P.2d 1158, 1161 (1937); *Wilson v. Washington Concrete Pipe Co.*, 178 Wash. 545, 550, 35 P.2d 71, 73 (1934).

60. *Platt v. Bradner Co.*, 131 Wash. 573, 580, 230 P. 633, 635 (1924); *Clark v. Schwaegler*, 104 Wash. 12, 12-14, 175 P. 300, 300-01 (1918).

61. 22 Wn. App. 768, 592 P.2d 658 (1979), *rev'd on other grounds*, 93 Wn. 2d 580, 611 P.2d 751 (1980).

62. *Id.*

63. *Kreger v. Hall*, 70 Wn. 2d 1002, 1008, 425 P.2d 638, 642 (1967); *Hubbell v. Ward*, 40 Wn. 2d 779, 787, 246 P.2d 468, 473 (1952); *Rummens v. Guaranty Trust Co.*, 199 Wash. 337, 346-47, 92 P.2d 228, 232 (1939).

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determination, the court is guided by the following admonition in *McCurdy v. Spokane Western Power & Traction Co.*⁶⁴

The protection of the [plaintiff] would in no event have called for anything more than the return of the property to its original owner. . . . The ends of justice would have required nothing more than that.

The doctrine of theoretical merger of identities has been evolved to operate as a shield and a protection against fraud and injustice; it is not to be used as a sword or bludgeon to accomplish an injustice. To saddle the major part of the traction company's indebtedness upon the valley company would be a perversion of justice in this instance.⁶⁵

In some cases, the corporate misconduct has created, or is closely related to, the underlying claim against the corporation.⁶⁶ In those cases, the shareholders' individual liability will, in all likelihood, be equal to the underlying claim against the corporation.⁶⁷ Although Washington's courts have expressed concern about litigation expenses arising out of proscribed corporate conduct,⁶⁸ it is unclear whether wrongdoing shareholders can be assessed additional damages for the reasonable attorneys' fees and costs incurred in successfully litigating issues involving the doctrine of disregard.⁶⁹

64. 174 Wash. 470, 24 P. 2d 1075 (1933).

65. *Id.* at 497, 24 P.2d at 1083-84.

66. *Culinary Workers Local 596 v. Gateway Cafe, Inc.*, 91 Wn. 2d 353, 357-58, 588 P.2d 1334, 1338 (1979); *Burns v. Norwesco Marine*, 13 Wn. App. 414, 419-20, 535 P.2d 860, 863-64 (1975); *Harrison v. Puga*, 4 Wn. App. 52, 58-59, 480 P.2d 247, 252 (1971); *Morrison v. Blue Star Navig. Co.*, 26 Wash. 541, 547, 67 P. 244, 246 (1901).

67. *Morgan v. Burks*, 93 Wn. 2d 580, 584, 611 P.2d 751, 755 (1980); *Harrison v. Puga*, 4 Wn. App. 52, 480 P.2d 247 (1971). In *Harrison* the defendant's personal liability was limited to the money fraudulently taken. *Id.* at 61-62, 480 P.2d at 254.

68. *Harrison v. Puga*, 4 Wn. App. 52, 63, 480 P.2d 247, 254 (1971).

69. There are no reported Washington cases in which such litigation expenses have been awarded. The supreme court has consistently held that litigation expenses are not ordinarily recoverable in the absence of a contract, statute, or recognized ground in equity. *Seattle School Dist. v. State*, 90 Wn. 2d 476, 540, 585 P.2d 71, 106 (1978). Neither WASH. REV. CODE §§ 23A.04-.98 (1979) (Washington Business Corporation Act) nor WASH. REV. CODE §§ 1.40.010-.130 (1979) (Washington Fraudulent Conveyance Act) establishes a right to recover such expenses. As yet, the court has not expressly recognized an equitable right to recover such expenses.

In *Morgan v. Burks*, 93 Wn. 2d 580, 589, 611 P.2d 751, 757 (1980), the supreme court rejected the plaintiffs' claim for bankruptcy fees allegedly resulting from corporate misconduct. While the court merely held that the attorneys' fees were not proximately related to the shareholders' misconduct, the court avoided the opportunity to expressly recognize that such a recovery could be made in a proper case. *Id.*

A litigant claiming such relief should emphasize the court's concern in preventing, and where necessary, in remedying the effects of "circuitous" litigation. *Harrison v. Puga*, 4 Wn. App. 52, 63, 480 P.2d 247, 254 (1971). Equity jurisprudence's ad hoc focus on individual justice and rendering complete relief is consistent with an award of litigation expenses. See text accompanying notes 63-65 *supra*.

Other cases involve a vast discrepancy, both qualitatively and quantitatively, between the underlying claim against the corporation and the alleged corporate misconduct.⁷⁰ When shareholders intentionally set up a sham corporation, they will be held personally liable for all of the corporation's debts and obligations.⁷¹ Less pervasive forms of financial misappropriation or undercapitalization may call for a remedy more closely tailored to the corporate misconduct.⁷² Many cases involve a readily quantifiable misappropriation of corporate assets.⁷³ In such situations, there is no valid reason for distinguishing between *subsequent* misappropriations⁷⁴ and misconduct "intrinsically involved"⁷⁵ with the operation of the corporation.⁷⁶ In both situations, the proper remedy would include

70. *E.g.*, *Morgan v. Burks*, 93 Wn. 2d 580, 611 P.2d 751 (1980) (tort judgment for personal injuries suffered in a shooting accident totalled \$2,350,000; corporate misconduct consisted of the subsequent issuance of \$126,000 in secured notes without consideration); *Allman Hubble Tugboat Co. v. Reliance Dev. Corp.*, 193 Wash. 234, 74 P.2d 985 (1938) (judgment on accounts for merchandise sold and services rendered; corporate misconduct was the intentional setting up of a sham corporation to avoid paying legitimate debts and obligations); *Deno v. Standard Furniture Co.*, 190 Wash. 1, 66 P.2d 1158 (1937) (tort judgment for personal injuries suffered in fall; allegations of prior commingling of assets and interests).

71. *Allman Hubble Tugboat Co. v. Reliance Dev. Corp.*, 193 Wash. 234, 74 P.2d 985 (1938). Where such deliberate deception has been perpetrated, the court, in all likelihood, will not limit personal liability to an amount commensurate with proper financial capitalization. Such pervasive deception negates the very being of the corporation and the corporate fiction will be totally disregarded. As the court indicated in *Morgan v. Burks*, 22 Wn. App. 768, 771-72, 592 P.2d 658, 659-60 (1979), *rev'd on other grounds*, 93 Wn. 2d 580, 611 P.2d 751 (1980), such shareholders will be treated as "de facto partners" fully liable for the obligations of the redefined business entity.

Implicit in the supreme court's rationale in *Morgan v. Burks* is a concern for deterring corporate misconduct. In ruling that personal liability is "not necessarily" limited to the amounts actually misappropriated, the court may create such a deterrent effect. 93 Wn. 2d at 584, 611 P.2d at 755. An unbending policy of limiting personal liability to the amount of the wrongful act, especially if litigation costs cannot be recovered, would place the wrongdoer in a no-lose situation.

72. *McCurdy v. Spokane Western Power & Traction Co.*, 174 Wash. 470, 497, 24 P.2d 1075, 1083-84 (1933). *See also* text accompanying notes 63-65 *supra*. The entire focus of the doctrine is that of achieving justice in the particular case before the court. *See J.I. Case Credit Corp. v. Stark*, 64 Wn. 2d 470, 478, 392 P.2d 215, 220 (1964); *Washington Sav-Mor Oil Co. v. State Tax Comm'n*, 58 Wn. 2d 518, 523, 364 P.2d 440, 443 (1961); *Platts, Inc. v. Platts*, 49 Wn. 2d 203, 206-08, 298 P.2d 1107, 1110 (1956); *Garvin v. Matthews*, 193 Wash. 152, 157, 74 P.2d 990, 992 (1938).

73. *E.g.*, *Morgan v. Burks*, 93 Wn. 2d 580, 622 P.2d 751 (1980); *Harrison v. Puga*, 4 Wn. App. 52, 480 P.2d 247 (1971).

74. Misappropriation occurring after a qualitatively distinct underlying claim has matured.

75. The "intrinsically involved" phraseology and the remedial rule pertaining to tortious activity qualitatively related to corporate misconduct are found in *Morgan v. Burks*, 93 Wn. 2d 580, 584, 611 P.2d 751, 755 (1980).

76. The harm suffered by the third party and the extent of the shareholders' wrongful conduct are the same in both cases. The timing of the misconduct and/or a qualitative distinction between the underlying claim and corporate misconduct are immaterial.

the restoration of the misappropriated assets⁷⁷ and the awarding⁷⁸ of litigation costs to the plaintiff.⁷⁹ The recent decision in *Morgan v. Burks*⁸⁰ recognizes that the trial court has the requisite flexibility to grant such relief.⁸¹

In some situations, quantitative evaluation of the corporate misconduct⁸² justifying⁸³ application of the doctrine will be difficult if not impossible.⁸⁴ In those situations, the court will have no choice but to hold the wrongdoing shareholders personally liable for the full amount of the underlying claim.⁸⁵

VI. THE SCOPE OF APPELLATE REVIEW

The Washington appellate courts have not developed a comprehensive approach for the review of cases involving the doctrine of disregard. This problem is attributable both to the appellate courts' failure to recognize

77. In *Morgan v. Burks*, 93 Wn. 2d 580, 588–89, 611 P.2d 751, 757 (1980), the court recognized that the “setting aside” of fraudulent conveyances could, in appropriate cases, be a satisfactory “alternative” to application of the doctrine of disregard. In fact, such relief (as well as the restoration of assets where the misappropriation has been consummated) can be conceptualized as one of several remedial tools available in cases involving the doctrine of disregard. See also note 125 *infra*.

78. As to whether such costs may be awarded, see note 69 *supra*.

79. Awarding reasonable attorneys' fees and costs makes the plaintiff whole and does not unfairly damage the defendant. The plaintiff's proper recovery should not, in these circumstances, be effectively reduced as a result of litigation costs resulting from shareholder misconduct.

80. 93 Wn. 2d 580, 611 P.2d 751 (1980).

81. *Id.* at 584, 588, 611 P.2d at 755, 757 (1980). But see note 69 and accompanying text *supra*.

82. Such an analysis will probably not even be undertaken where the corporation itself was intentionally formed for the purpose of defrauding a creditor or a potential class of creditors. See note 71 *supra*. The shareholders in that situation will be held fully liable for the corporation's obligations. Only those shareholders chargeable with less pervasive misconduct are likely to be held liable for an amount less than the underlying claim.

83. Not all misconduct will justify a disregarding of the corporate entity. While the various irregularities listed in note 38 *supra* can evidence an “intent” to abuse the corporate form, only misconduct actually prejudicing third parties is actionable. *Morgan v. Burks*, 93 Wn. 2d 580, 587, 611 P.2d 751, 756–57 (1980). The failure to keep corporate minutes and records, to conduct regular meetings, or to keep separate books are nonquantifiable irregularities that in themselves will in all likelihood not justify application of the doctrine. *Truckweld Equip. Co., v. Olson*, 26 Wn. App. 638, 644, ____ P.2d ____, ____ (1980). Only those irregularities adversely affecting the corporation's financial ability to meet its obligations will justify disregarding the corporate form. As the court recognized in *Truckweld Equip. Co.*, 26 Wn. App. at 644–45, ____ P.2d at ____: “Typically, the injustice which dictates a piercing of the corporate veil is one involving fraud, misrepresentation, or some form of manipulation of the corporation to the stockholder's benefit and the creditor's detriment. *Morgan v. Burks*, 93 Wn. 2d 580, 611 P.2d 751 (1980).” (Citation to Pacific Reporter added).

84. The failure to keep proper corporate records may prevent the court from ascertaining the full extent to which corporate funds have been commingled or otherwise misappropriated. Quantification is also difficult where undercapitalization is alleged. Determining that the corporation's working capital is insufficient may be far easier than ascertaining the exact capitalization that should have been established.

85. Such a determination is clearly within the trial court's discretion. *Morgan v. Burks*, 93 Wn. 2d 580, 584, 611 P.2d 751, 755 (1980).

that such claims must be tried to the court⁸⁶ and to their general disinclination to distinguish meaningfully between findings of fact and conclusions of law.⁸⁷

The two basic rules governing the review of cases tried to the court⁸⁸ are well-established. Findings of fact will not be disturbed when they are supported by substantial evidence.⁸⁹ Conclusions of law⁹⁰ are freely and fully reviewable by the appellate courts.⁹¹ With respect to these two issues, the scope of review in cases involving the doctrine of disregard and other equitable matters is the same as in law cases.⁹²

Unfortunately, delineating the scope of review in non-jury cases is not

86. See notes 51-62 and accompanying text *supra*.

87. Civil Rule 52(a)(1) requires the trial court to set out its findings of fact and then state separately its conclusions of law:

RULE 52. DECISIONS, FINDINGS AND CONCLUSIONS

(a) Requirements.

(1) *Generally*. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law. Judgment shall be entered pursuant to Rule 58 and may be entered at the same time as the entry of the findings of fact and the conclusions of law.

WASH. CIV. R. 52(a)(1).

Rule 52 does not, however, set out a substantive test for distinguishing between findings of fact and conclusions of law.

88. In this respect, cases tried without a jury and those tried after an advisory jury has been empaneled are indistinguishable. See notes 52 and 87 *supra*.

89. *Maehren v. City of Seattle*, 92 Wn. 2d 480, 486, 599 P.2d 1255, 1260 (1979); *Sigman v. Stevens-Norton, Inc.*, 70 Wn. 2d 915, 920, 425 P.2d 891, 895 (1967); *Lantis v. Pfarr*, 67 Wn. 2d 994, 995, 410 P.2d 900, 901 (1966). When it reviews disputed issues of fact, a Washington appellate court will not substitute its judgment for that of the trial court. *Sigman*, 70 Wn. 2d at 919, 425 P.2d at 894.

90. In analyzing the scope of review, it is important to distinguish between questions of law and factual determinations made as a matter of law. The former involve issues that are inherently legal. Those issues are subject to full review by the appellate courts. *Local 1296, Int'l Ass'n of Firefighters v. City of Kennewick*, 86 Wn. 2d 156, 161-62, 542 P.2d 1252, 1256 (1975). The latter are factual issues resolved by the trial court solely because the issue was one about which reasonable men could not differ. *Shelby v. Keck*, 85 Wn. 2d 911, 913, 541 P.2d 365, 368 (1975). In reviewing a factual determination made as a matter of law, the appellate court determines whether or not there was evidence sufficient to create a reasonable difference of opinion. *Levy v. North Am. Ins.*, 90 Wn. 2d 846, 851, 586 P.2d 845, 848 (1978); *Wilber Dev. Corp. v. Les Rowland Constr., Inc.*, 83 Wn. 2d 871, 877, 523 P.2d 186, 189 (1974).

91. *Local 1296, Int'l Ass'n of Firefighters v. City of Kennewick*, 86 Wn. 2d 156, 161-62, 542 P.2d 1252, 1256 (1975); *Leschi Imp. Council v. State Highway Comm'n*, 84 Wn. 2d 271, 286-87, 525 P.2d 774, 785 (1974); *Harrison v. Consol. Holding Co.*, 200 Wash. 434, 441, 93 P.2d 729, 732 (1939). As the supreme court stated in *Leschi*, 84 Wn. 2d at 286, 525 P.2d at 785: "Concerning conclusions of state law this court is the final arbiter, and conclusions of state law entered by an administrative agency or court below are not binding on this court. . . ."

92. Since the abolition of the distinction between law and equity, the supreme court has utilized the same scope of review for both law and equity cases. *Haire v. Patterson*, 63 Wn. 2d 282, 286, 386 P.2d 953, 955-56 (1963); *Detjen v. Detjen*, 40 Wn. 2d 479, 483, 244 P.2d 238, 240 (1952). Prior to the abolition of this distinction in 1951, equitable matters were tried de novo on appeal. *Hubbell v. Ward*, 40 Wn. 2d 779, 781, 246 P.2d 468, 469 (1952).

so easily resolved. Before an appellate court can choose between the two standards of review, the proposition before it must be correctly designated as either a finding of fact or a conclusion of law. Incorrect *designation* by the trial court is only a minor problem. Washington's appellate courts review the trial court's designation of findings and conclusions,⁹³ and serve as the final arbiters as to how a proposition should be denominated.⁹⁴ Conclusions of law, wrongly designated as findings of fact, will be reviewed as questions of law.⁹⁵ Findings of fact, even if incorrectly designated, will not be reversed if they are supported by substantial evidence.⁹⁶

The major problem is a substantive one. The Washington courts have not developed a general formula or test for distinguishing between findings of fact and conclusions of law. In fact, Washington's courts have not even addressed the conceptual difficulties inherent in designating findings and conclusions.⁹⁷ The existence of issues that are not wholly factual or legal further complicates the courts' task. While Washington's appellate courts have recognized the existence of these mixed questions of fact and law, they have not dealt with this hybrid determination in a systematic way.⁹⁸

The formulation of one general test for distinguishing between findings

93. Local 1296, Int'l Ass'n of Firefighters v. City of Kennewick, 86 Wn. 2d 156, 162, 542 P.2d 1252, 1256 (1975); Ferree v. Doric Co., 62 Wn. 2d 561, 567, 383 P.2d 900, 904 (1963).

94. Local 1296, Int'l Ass'n of Firefighters v. City of Kennewick, 86 Wn. 2d 156, 162, 542 P.2d 1252, 1256 (1975); Lehmann v. Board of Trustees of Whitman College, 89 Wn. 2d 874, 878, 576 P.2d 397, 399 (1978); Wilson v. Westinghouse Elec. Corp., 85 Wn. 2d 78, 82-83, 530 P.2d 298, 301 (1975).

95. Local 1296, Int'l Ass'n of Firefighters v. City of Kennewick, 86 Wn. 2d 156, 161-62, 542 P.2d 1252, 1256 (1975).

96. Hoke v. Stevens-Norton, Inc., 60 Wn. 2d 775, 778, 375 P.2d 743, 745-46 (1962).

97. Grayson v. Nordic Constr. Co., 92 Wn. 2d 548, 552-53, 599 P.2d 1271, 1273 (1979); Culinary Workers Local 596 v. Gateway Cafe, Inc., 91 Wn. 2d 353, 367, 588 P.2d 1334, 1343 (1979); Local 1296, Int'l Ass'n of Firefighters v. City of Kennewick, 86 Wn. 2d 156, 161-62, 542 P.2d 1252, 1256 (1975).

98. The supreme court's consideration of mixed questions of fact and law has been result-oriented and inconsistent. The court has employed meaningless jargon rather than analysis. In Wilson v. Westinghouse Elec. Corp., 85 Wn. 2d 78, 530 P.2d 298 (1975), the court reviewed a determination designated by the trial court as a finding of fact. The supreme court held that the finding was fully reviewable since it was a mixed question of fact and law "approximating" a conclusion of law. *Id.* at 82-83, 530 P.2d at 301.

In Ferree v. Doric Co., 62 Wn. 2d 561, 383 P.2d 900 (1963), the court reviewed a determination designated by the trial court as a conclusion of law. The court held that a conclusion that "partakes" of the "nature" of a finding of fact should be reviewed as a finding, and employed the "substantial evidence" standard. *Id.* at 567, 383 P.2d at 904. Similarly, in Lehmann v. Board of Trustees of Whitman College, 89 Wn. 2d 874, 576 P.2d 397 (1978), the court held that a conclusion of law was a mixed determination of fact and law. Since that conclusion "implied" a factual determination "sufficient" to treat it as a mixed issue, the conclusion was reviewed under the "substantial evidence" standard. *Id.* at 878, 576 P.2d at 399.

In Hanson v. Lee, 3 Wn. App. 461, 466, 476 P.2d 550, 554 (1970), the court of appeals deter-

and conclusions in all non-jury cases may not be possible.⁹⁹ The development of a single, fixed standard of review for mixed findings and conclusions would be even more difficult. The Washington courts could, however, establish specific standards of review for many of the different substantive issues they review.

Such standards could and should be established for claims involving the doctrine of disregard. Recent decisions applying the doctrine highlight the need for an analytical approach. In *Culinary Workers Local 596 v. Gateway Cafe, Inc.*¹⁰⁰ and *Morgan v. Burks*,¹⁰¹ the supreme court reviewed as questions of law both the characterization of shareholder activity and the ultimate decision to disregard. The court adopted the opposite approach in *Grayson v. Nordic Construction Co.*¹⁰² In that case, the trial court made "findings of fact" in which it both characterized the cor-

mined that a conclusion of law contained "subject matter sufficiently factual in nature to be treated as a finding." When confronted with a finding of fact in *In re Clark*, 26 Wn. App. 832, 835, 611 P.2d 1343, 1344 (1980), the court held that the finding was "at least partly" a conclusion of law and should, therefore, be reviewed as a conclusion of law.

99. The United States Court of Appeals for the Ninth Circuit has formulated a general test for distinguishing between findings of fact and conclusions of law. In *Lundgren v. Freeman*, 307 F.2d 104, 115 (9th Cir. 1962), the court set out the following two formulae: "A finding of fact, to which the clearly erroneous rule applies [as contrasted with Washington's "substantial evidence" standard], is a finding based on the "fact-finding tribunal's experience with the mainsprings of human conduct." A conclusion of law would be a conclusion based on application of a legal standard."

At least two commentators have characterized this test as being unworkable. Weiner offers the following analysis of the *Lundgren* test:

The *Lundgren* test for distinguishing law from fact for Rule 52(a) purposes is unworkable. Its deficiencies are apparent when the test is applied to the question whether undisputed facts should be characterized as negligence. Such a determination would be "based on . . . experience with the mainsprings of human conduct." But it would *equally* be "based on application of a legal standard," the reasonably prudent man concept.

Subsequent Ninth Circuit decisions show that the inadequacy of the *Lundgren* bifurcation is not limited to cases concerning the reasonableness of given conduct.

Weiner, *The Civil NonJury Trial and the Law-Fact Distinction*, 55 CALIF. L. REV. 1020, 1054 (1967) (emphasis added).

That same criticism is set out in Note, *Rule 52(a): Appellate Review of Findings of Fact Based on Documentary or Undisputed Evidence*, 49 VA. L. REV. 506, 530-31 (1963):

The [*Lundgren*] court's reasoning . . . requires close examination. . . .

Doubtless a finding is a conclusion of law if based "solely" on the application of legal standards. But, can it reasonably be said that a trial judge relies on his "experience with human affairs" to the exclusion of the application of any legal standards in deriving a factual inference, such as mutual mistake, from undisputed evidence? On the contrary, as pointed out in the *Galena Oaks* discussion, every finding of ultimate fact involves some degree of legal reasoning. The question thus becomes, as in *Cordovan* and *Galena Oaks*, at what point does the use of the legal standard so predominate the finding that it becomes a conclusion of law? A further pertinent inquiry is whether such a test is really workable in this context.

A proper answer to these problems cannot be arrived at by oversimplification—any solution must be one of degree, recognizing traditional precepts.

100. 91 Wn. 2d 353, 367, 588 P.2d 1334, 1343 (1979).

101. 93 Wn. 2d 580, 585-90, 611 P.2d 751, 755-58 (1980).

102. 92 Wn. 2d 548, 599 P.2d 1271 (1979).

poration's activities and concluded that, under the circumstances, the corporation and its president were "alter egos."¹⁰³ On review, the supreme court adopted the trial court's "finding of fact" designation and utilized the "substantial evidence" standard in reviewing those determinations.¹⁰⁴

Missing from the Washington courts' analysis is a clear consideration of the four different determinations that should be made by the trial court in cases involving the doctrine. It is this failure that has produced such imprecise standards for appellate review. In fact, the doctrine's processes are readily identifiable. In properly resolving a claim involving the doctrine of disregard, the trial court must accomplish the following:¹⁰⁵

1. Make factual determinations as to what corporate and shareholder activities actually occurred;¹⁰⁶
2. Evaluate shareholder activity and characterize that conduct as being either permissible or a misuse of the corporate form;¹⁰⁷
3. Determine whether, and to what extent, any abuse of the corporate form was a proximate cause of harm to the person asserting the doctrine of disregard;

103. *Id.* at 551–52, 599 P.2d at 1273. Although neither the language in the trial court's finding nor the supreme court's analysis so indicate, the trial court proceeded as if the ultimate decision as to whether or not to disregard was automatic once the corporation and president were characterized as alter egos. In fact, even where shareholder misconduct warrants the "alter ego" characterization, the trial court must still determine whether that misconduct was a proximate cause of harm. *See* note 83 *supra* and notes 108–09, 118–24 and accompanying text *infra*.

104. *Id.* at 553, 599 P.2d at 1274. *See also* Truckweld Equip. Co. v. Olson, 26 Wn. App. 638, 643–46, ____ P.2d ____, ____ (1980).

105. The functions performed by the court are listed in the logical order in which they should be approached.

106. *See* notes 26–27 and accompanying text *supra* and note 111 *infra*. In taking evidence and resolving factual disputes, the trial court may enter findings as to the subjective motivations of the shareholders.

107. The supreme court has not expressly referred to this determination as one involving a "characterization" process. *See* note 110 *infra*. In any case, this analysis must necessarily be undertaken in considering the first element of the court's conjunctive test. *See* notes 26–27 and accompanying text *supra*.

The subjective intent of the shareholders or others accused of misusing the corporation will undoubtedly influence the trial court's characterization of their conduct. Application of the doctrine, however, is not dependent upon a determination that the shareholders had a subjective intention to misuse the corporation. The trial court will primarily concern itself with the shareholders' manifest conduct. As Justice Horowitz recognized in *Disregarding the Entity of Private Corporations*, 15 WASH. L. REV. 1, 9 (1940), the trial court will employ an objective analysis in characterizing shareholder conduct: "It will be remembered that the formation, control and manipulation of separate entities is intentional in character. The word 'intentional' is not used to mean secret, uncommunicated intent but rather intent as manifested by outward act or conduct—overt intent."

The supreme court has expressly adopted this test. *Morgan v. Burks*, 93 Wn. 2d 580, 586–87, 611 P.2d 751, 756–57 (1980); *J.I. Case Credit Corp. v. Stark*, 64 Wn. 2d 470, 475, 392 P.2d 215, 218 (1964). The entire characterization process is nothing more than Justice Horowitz' search for "overt intent."

a. Determine whether shareholder misconduct was a cause-in-fact of harm to the party seeking relief;¹⁰⁸

b. When shareholder misconduct is a cause-in-fact of damage, after weighing mixed legal considerations, determine whether personal legal liability should be affixed upon the wrongdoing shareholders;¹⁰⁹

4. When misuse of the corporate form has proximately harmed a person entitled to assert the doctrine, create a remedy broad enough to right the wrong suffered by that person.¹¹⁰

In selecting the proper standard of review, each of the trial court's four determinations should be independently considered. The first determination is inherently factual.¹¹¹ Washington's appellate courts have consistently recognized that they will not retry factual disputes concerning what corporations and their shareholders allegedly thought or did.¹¹² Such determinations will not be disturbed when they are based upon substantial evidence.¹¹³

After the trial court has resolved factual disputes as to what occurred, it must evaluate the shareholders' actions and characterize them as being either permissible activities or an abuse of the corporate form. This second determination is a mixed question of fact and law involving an application of legal principles to the underlying factual determinations already made by the trial court.

The legal component of the second determination is substantial. These legal principles, incrementally formulated by the supreme court,¹¹⁴ are

108. *Morgan v. Burks*, 93 Wn. 2d 580, 587-88, 611 P.2d 751, 756-57 (1980); *King v. City of Seattle*, 84 Wn. 2d 239, 249-50, 525 P.2d 228, 234-35 (1974).

109. *King v. City of Seattle*, 84 Wn. 2d 239, 249-50, 525 P.2d 228, 234-35 (1974).

110. The conjunctive test formulated by the supreme court impliedly calls for the performance of these four functions. See notes 26-27 and accompanying text *supra*. The general wording in the court's formula, however, does not expressly describe the mechanics of how issues involving the doctrine of disregard should be litigated or reviewed.

111. In *Morgan v. Burks*, 93 Wn. 2d 580, 586-87, 611 P.2d 751, 756 (1980), the court recognized the factual nature of these determinations: "Those cases set out the standard used by the court in making the factual determinations of the parties' intent with regard to the corporate entity."

The supreme court "standard" referred to by Justice Horowitz in *Morgan v. Burks* is not "applied" to factual determinations. That standard merely alerts the trial court to the factual matters that bear upon the issue. Applying substantive legal principles to characterize these factual findings is a second and conceptually distinct judicial function. For an analysis of that process, see notes 114-16 and accompanying text *infra*.

112. *Ferree v. Doric Co.*, 62 Wn. 2d 561, 568, 383 P.2d 900, 905 (1963); *Thorndyke v. Hesperian Orchards, Inc.*, 54 Wn. 2d 570, 575, 343 P.2d 183, 186 (1959).

113. See note 89 *supra*.

114. Washington's adversary system precludes its courts from addressing issues that are not before the court. *State v. Durham*, 39 Wn. 2d 781, 784, 238 P.2d 1201, 1203 (1951); *State ex rel. N.Y. Cas. Co. v. Superior Court*, 31 Wn. 2d 834, 840, 199 P.2d 581, 585 (1948). Consequently, the Washington courts have not rendered an appellate decision setting out a binding compendium of legal

the foundation for the trial court's characterization of the shareholders' activities. When such a mixed determination is founded on an erroneous legal concept, it cannot be sustained.¹¹⁵ Consequently, determinations involving the evaluation and characterization of corporate activities should be reviewed as questions of law.¹¹⁶

Both the trial court's first and second determinations are subsumed within the first element of the supreme court's two-part formula.¹¹⁷ The third determination, deciding whether shareholder misconduct was a proximate cause of harm,¹¹⁸ involves the second element¹¹⁹ of the con-

principles applicable to the characterization process. Those principles, however, are scattered throughout the supreme court cases involving the doctrine of disregard. The following propositions are examples of the legal principles guiding and limiting the trial court's evaluation and characterization of shareholder activities:

1. The separate existence of a corporation will not be disregarded solely because its assets are not sufficient to discharge its obligations. *Morgan v. Burks*, 93 Wn. 2d 580, 589, 611 P.2d 751, 757 (1980); *Frigidaire Sales Corp. v. Union Properties, Inc.*, 88 Wn. 2d 400, 406, 562 P.2d 244, 247 (1977).

2. Shareholders can legitimately use the corporate form as a means of limiting their liability. *Culinary Workers Local 596 v. Gateway Cafe, Inc.*, 91 Wn. 2d 353, 366, 588 P.2d 1334, 1343 (1979); *Burns v. Norwesco Marine, Inc.*, 13 Wn. App. 414, 418, 535 P.2d 860, 862-63 (1975).

3. Deliberate attempts to use the corporate form for the frustration of particular obligations will not be permitted. *Culinary Workers Local 596*, 91 Wn. 2d at 366, 588 P.2d at 1343.

4. Sham corporations, inadequately capitalized and set up with the intent of defrauding all creditors, or a class of creditors, will be disregarded. *Allman Hubble Tugboat Co. v. Reliance Dev. Corp.*, 193 Wash. 234, 237-39, 74 P.2d 985, 986-87 (1938).

5. Gutting or otherwise misappropriating a corporation's assets will never be permitted. *Morgan*, 93 Wn. 2d at 584-85, 611 P.2d at 754-55; *Harrison v. Puga*, 4 Wn. App. 52, 64, 480 P.2d 247, 255 (1971).

6. A subsidiary corporation is not abused simply because a parent corporation owns all or most of the subsidiary's stock, the parent corporation loaned money to the subsidiary, and each company has the same president, general manager and trustees. *Sommer v. Yakima Motor Coach Co.*, 174 Wash. 638, 649-59, 26 P.2d 92, 96-100 (1933).

7. It is not improper for all of the stock of a close corporation to be owned by members of a single family or by one person. *Grayson v. Nordic Constr. Co.*, 92 Wn. 2d 548, 553, 599 P.2d 1271, 1274 (1979); *State v. Northwest Magnesite Co.*, 28 Wn. 2d 1, 41, 182 P.2d 643, 664 (1947).

8. In evaluating and characterizing shareholder conduct after it has considered the *entirety* of each shareholder's activities, the trial court should determine whether those activities are consistent with honesty and fair dealing. *Sommer*, 174 Wash. at 653, 26 P.2d at 97.

Other examples of corporate abuse, listed by the California courts and in the Horowitz article, are set out in note 38 *supra*.

115. *Local 1296, Int'l Ass'n of Firefighters v. City of Kennewick*, 86 Wn. 2d 156, 162, 542 P.2d 1252, 1256 (1975); *Harrison v. Consol. Holding Co.*, 200 Wash. 434, 441, 93 P.2d 729, 732 (1939).

116. See *Weiner*, *supra* note 99, at 1056.

117. See note 27 and accompanying text *supra*.

118. *Id.* The supreme court's language prohibiting conduct that would "aid the consummation of a fraud or wrong upon others" is nothing more than a statement of the proximate cause requirement. See *Garvin v. Matthews*, 193 Wash. 152, 157, 74 P.2d 990, 992 (1938).

119. See note 27 and accompanying text *supra*.

junctive formula. This determination is a complex one. As the supreme court recognized in *King v. City of Seattle*,¹²⁰ the proximate cause issue involves mixed questions of fact and law.¹²¹ The legal component of that issue involves the ultimate question of whether legal liability should attach.¹²²

When it has expressly discussed the scope of its review, the supreme

120. 84 Wn. 2d 239, 525 P.2d 228 (1974).

121. In discussing this issue, the court said the following:

The City's actions here were a cause in fact of the plaintiffs' damages, and the amount of damages is not disputed. . . .

This is the sense in which the term "proximate cause" is often discussed. See WPI 15.01. Cause in fact is not, however, the sole determinate [sic] of proximate cause, and in a broader sense the question of law as to whether legal liability should attach, given cause in fact, is the question still before us in this case. . . .

As a matter of policy we cannot say on these facts that the defendant City should be legally liable for the plaintiffs' loss. Conceding all the other elements of tort liability are present, they are not sufficient in themselves to make out a prima facie case. The court still must adduce from the record whether, as a policy of law, legal liability should attach to the defendant if the other factual elements are proven and no affirmative defense is made out. "[C]ausation, as such, is a question of fact. Proximate causation is a question of law. The entire doctrine [of proximate cause] assumes that a defendant is not necessarily to be held responsible for all the consequences of his acts." McLaughlin, *Proximate Cause*, 39 HARV. L. REV. 149, 155 (1925).

The trial court in finding of fact No. 9 determined that the City's acts were "a proximate cause" of the plaintiffs' damages. We treat this finding as a conclusion of law, its proper designation, subject to the review of this court as a *question of law*. See L. Green, *Rationale of Proximate Cause*, ch. 1 §§ 3-4 (1927); I T. Street, *Foundations of Legal Liability*, 110 (1906); Terry, *Proximate Consequences in the Law of Torts*, 28 HARV. L. REV. 10, 24 (1914).

The standards which a court must apply to a tort action in determining whether legal liability should attach to the defendant if the factual elements of the tort are proven, are not susceptible of a conclusive and fixed set of rules, readily formulated. "[L]egal liability is always to be determined on the facts of each case upon mixed considerations of logic, common sense, justice, policy, and precedent. . . . The best use that can be made of the authorities on proximate cause is merely to furnish illustrations of situations which judicious men upon careful consideration have adjudged to be on one side of the line or the other." I T. Street, *Foundations of Legal Liability*, 110 (1906).

King v. City of Seattle, 84 Wn. 2d 239, 249-50, 525 P.2d 228, 234-35 (1974) (emphasis added).

In cases involving the doctrine of disregard, the status of the person invoking the doctrine is an important aspect of the proximate cause determination. *Garvin v. Matthews*, 193 Wash. 152, 156-57, 74 P.2d 990, 992 (1938); see also notes 13-20 and accompanying text *supra*.

The supreme court has often recited the maxim that the issue of proximate cause is a question of fact to be resolved by the *jury*. *Boeing v. State*, 89 Wn. 2d 443, 449, 572 P.2d 8, 12 (1978); *Moyer v. Clark*, 75 Wn. 2d 800, 804, 454 P.2d 374, 376 (1969). That maxim is entirely consistent with the rule that in non-jury cases the issue of proximate cause should be reviewed as a conclusion of law. The proximate cause issue is a mixed question of fact and law irrespective of whether it arises in a jury or non-jury case. In a jury case, the trial court resolves the legal aspects of the question *before* the jury makes the ultimate determination as to whether proximate causation exists. Before submitting the issue to a jury, the trial court determines that, as a policy of law, liability may properly be affixed in that case. After making that determination, a routine decision in many types of cases, the court also provides the jury with an instruction on the law governing its consideration of the proximate cause issue.

122. *King v. City of Seattle*, 84 Wn. 2d 239, 249-50, 525 P.2d 228, 234-35 (1974).

court has held that a determination involving the proximate cause issue should be characterized as a conclusion of law fully reviewable by the appellate courts as a question of law.¹²³ In practice, however, Washington's appellate courts have utilized a different standard of review for each of the two components of the proximate cause issue. The cause-in-fact component of the proximate cause issue has been reviewed as a finding of fact. The trial court's determination as to whether legal liability should attach has been reviewed as a question of law.¹²⁴

In a case in which it disregards a corporation's separate existence, the trial court must select an appropriate remedy.¹²⁵ Unlike the standards for

123. *Id.* See also *Wilson v. Westinghouse Elec. Corp.*, 85 Wn. 2d 78, 82-83, 530 P.2d 298, 301 (1975). In *Culinary Workers Local 596 v. Gateway Cafe, Inc.*, 91 Wn. 2d 353, 588 P.2d 1334 (1979), both the trial court and the supreme court resolved these mixed considerations in a rather cryptic manner. The court merely determined that the factual situation in that case was one where it was "appropriate" to disregard the corporate entity and affix personal liability against the wrongdoing shareholders. *Id.* at 367, 588 P.2d at 1343.

124. The supreme court's own analysis in *King v. City of Seattle*, 84 Wn. 2d 239, 249-50, 525 P.2d 228, 234-35 (1974), demonstrates that the two components of the proximate cause issue can be conceptually segregated from each other. The cause-in-fact component of the proximate cause issue is a factual matter. That component can be practicably distinguished from the mixed legal considerations evaluated by the trial court in determining whether legal liability should attach. See note 121 *supra*.

In fact, Washington's appellate courts review non-jury determinations of causation-in-fact as factual findings. The "substantial evidence" standard of review is routinely applied to determinations designated as "findings of fact" if (1) those determinations are limited solely to disputes involving factual causation, and (2) the trial court separately states, in a determination designated as a "conclusion of law," whether proximate causation exists. The application of a different standard for reviewing each component of the proximate cause issue is consistent with the principle that, with respect to disputed issues of fact, Washington's appellate courts will not substitute their judgment for that of the trial court. See note 89 *supra*.

The supreme court has, itself, impliedly adopted a separate standard for each component. Although the court did not directly address this issue in *King v. City of Seattle*, it did not review Finding of Fact No. 8, the trial court's determination as to factual causation, as a question of law. *King v. City of Seattle*, 84 Wn. 2d 239, 242, 249-50, 525 P.2d 228, 231, 234-35 (1974). The supreme court accepted the trial court's factual determination that the city's acts prevented the plaintiff from constructing an office building. In considering the proximate cause issue, the supreme court reviewed only the ultimate issue as to whether legal liability should attach, as a question of law.

125. The remedies available to the trial judge include the following:

1. Determining that a shareholder or other entity has a duty to perform an obligation incurred by the corporation. *Superior Portland Cement, Inc. v. Pacific Coast Cement Co.*, 33 Wn. 2d 169, 205 P.2d 597 (1949); *State ex rel. Tacoma v. Tacoma Ry. & Power Co.*, 61 Wash. 507, 112 P. 506 (1911). See also note 10 *supra*;
2. Enjoining the transfer of assets from a corporation to its shareholders. *Morgan v. Burks*, 93 Wn. 2d 580, 611 P.2d 751 (1980);
3. Mandating that a shareholder return property or perform some other act. *McCurdy v. Spokane Western Power & Traction Co.*, 174 Wash. 470, 497, 24 P.2d 1075, 1083-84 (1933); *State ex rel. Tacoma v. Tacoma Ry. & Power Co.*, 61 Wash. 507, 112 P. 506 (1911);
4. Refusing, as a result of the plaintiff's actions, to recognize a traditional limitation on the assertion of an affirmative defense. *J.I. Case Credit Corp. v. Stark*, 64 Wn. 2d 470, 478, 392 P.2d 215, 220 (1964);

the other three determinations, the choice of the proper standard for the fourth determination is not based upon the law-fact distinction. Washington's appellate courts have afforded trial judges considerable discretion in the selection of remedies.¹²⁶

VII. CONCLUSION

Consistent with its equitable origins, the doctrine of disregard is encumbered by few rigid jurisprudential concepts. As a result, Washington's courts have substantial flexibility in remedying corporate misconduct. Any further substantive doctrinal development would be counterproductive. Litigants would benefit, however, both from a definitive holding on the jury trial issue and from an express formulation of rules governing the appellate review of cases involving the doctrine.

5. Setting aside contractual obligations or entitlements. *Morgan*, 93 Wn. 2d at 588-89, 611 P.2d at 757;

6. Awarding money damages to the injured party. *Sommer v. Yakima Motor Coach Co.*, 174 Wash. 638, 648-49, 26 P.2d 92, 96 (1933); *Peterick v. State*, 22 Wn. App. 163, 167, 589 P.2d 250, 255 (1970); *see also* notes 64-85 and accompanying text *supra*.

126. This inherent discretionary power exists in any equitable proceeding in which a trial court is fashioning a remedy after having correctly resolved the liability issue. Questions of law will be fully reviewed by the appellate courts in both legal and equitable proceedings. *See* note 92 *supra*.

In *Coy v. Raabe*, 77 Wn. 2d 322, 326, 462 P.2d 214, 216 (1966), the court recognized the trial court's discretionary power to select an appropriate remedy: "In any equitable proceeding, the trial court has certain inherent discretion which can be exercised." *See also* *Ford v. County Dist. Board of Health*, 16 Wn. App. 709, 558 P.2d 821 (1977). In *Tradewell Stores v. T.B. & M., Inc.*, 7 Wn. App. 424, 428, 500 P.2d 1290, 1293 (1972), the court of appeals, citing *Coy v. Raabe*, held that it was "required" to give "great weight" to the trial court's inherent discretion in granting relief in an equitable proceeding. *Cf. McCurdy v. Spokane Western Power & Traction Co.*, 174 Wash. 470, 497, 24 P.2d 1075, 1083-84 (1973) (without discussing the scope of its review, the court implied in *obiter dictum* that it would closely review the remedy selection process in cases involving the doctrine of disregard).